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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 705

SWITCHMEN'S UNION OF NORTH AMERICA, An Unincorporated Labor Union; R. H. MORITZ; L. B. HILL; and V. H. WORKMAN,

Petitioners,

v.

THE OGDEN UNION RAILWAY AND DEPOT COMPANY, A Corporation; and BROTHERHOOD OF RAILROAD TRAINMEN, An Unincorporated Labor Union,

Respondents.

BRIEF OF RESPONDENT THE OGDEN UNION RAILWAY AND DEPOT COMPANY, A CORPORATION, IN OPPOSITION TO GRANTING WRIT OF CERTIORARI

The respondent The Ogden Union Railway and Depot Company, a corporation, respectfully prays that petitioners' application for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit,

entered in the above entitled case on January 2, 1954, be denied.

OPINIONS BELOW

The opinion of the District Court (Oral Statement 275-279) is unreported. The opinion of the Court of Appeals (R. 286-290) is reported in 209 F. 2d 419.

SUPPLEMENTARY STATEMENT OF THE CASE

A supplement to petitioners' statement of facts may serve to clarify the issues presented. This case went to trial in the District Court on the second amended complaint of petitioners seeking to have declared illegal and in violation of the Railway Labor Act (45 U. S. C. 152), a provision in the collective bargaining agreement between the respondent carrier and the respondent Brotherhood of Railroad Trainmen, the bargaining agent for all employes classified as "yardmen" in respondent carrier's operations at Ogden, Utah (R. 99). For ready reference, the disputed provision reads as follows:

> "Note—Reinstatement will not be permitted after the expiration of six months from date of dismissal unless agreeable to the management and the general committee, except that a case pending with either the B. R. T. or O. R. C. at the expiration of the six month period, will not be prejudiced. Where the yardman involved has been out of service six months or less it will not be obligatory to consult the committees representing these classes of employes in considering the case for reinstatement" (R. 5).

Petitioners also prayed for an order of reinstatement to their former employment, with seniority and vacation rights unimpaired, and for judgment against the carrier for all back pay lost (R. 99). The individual petitioners, Moritz, Hill

and Workman, had been dismissed for rules violations by the carrier. They did not choose the bargaining agent respondent Trainmen; but chose the petitioner, Switchmen's Union of North America, to handle their grievance with the carrier (R. 110). The carrier recognized the Switchmen's Union as plaintiffs' representative. Conferences and negotiations were had and correspondence was exchanged between the officers of the carrier and the officers of the Switchmen's Union concerning reinstatement of the three individual petitioners (R. 8, 110). Reinstatement with back pay was first asked by petitioners' representative, which the carrier was unwilling to grant (R. 8, 110). Thereafter, the demand for back pay was withdrawn and the carrier indicated its willingness to reinstate the individual petitioners without back pay (R. 8, 101, 102, 110); but six months having elapsed, the offer was made contingent upon the acquiescence therein of the Trainmen's Union, the bargaining agent, in conformity with the above quoted provision of the contract (R. 8, 111).

The offer was immediately rejected by the Switchmen's Union representing the individual petitioners. The carrier was advised that the request for reinstatement on a leniency basis was withdrawn, the demand for reinstatement with back pay for all lost time was reinstated, and the carrier was given notice that petitioners intended to appeal the grievance to the National Railroad Adjustment Board (Defendant's Exhibit A; R. 281, 282). The matter, however, was not referred to the National Railroad Adjustment Board, but this suit was instituted in the Federal District Court and relief was prayed for as above set forth (R. 99).

The trial court found and entered its decree that the disputed provision was lawful in terms and effect (R. 178, 179), and having heard evidence, concluded and decreed that the evidence was insufficient to warrant a finding that

the respondents, or either of them, had discriminatorily applied the provision in violation of petitioners' rights under the Railway Labor Act (R. 178-9, 180). The court further found that petitioners had not exhausted their administrative remedies under the Railway Labor Act to present their claims to the National Railroad Adjustment Board (R. 178, 179), and decreed that petitioners' remedy, if any, was within the exclusive jurisdiction of the National Railroad Adjustment Board (R. 179, 180). These findings obviously involved a determination by the Federal District Court that it was without jurisdiction. Petitioners' statement on page 7 of their brief that, "the Court of Appeals *erroneously* stated that the District Court had dismissed the case for want of jurisdiction", does not therefore accord with the facts.

QUESTIONS PRESENTED

I. Is the provision of the contract in question illegal per se and on its face violative of any of petitioners' rights under the Railway Labor Act?

II. Is the policing and granting of relief from the discriminatory application of a contract not illegal on its face, entered into pursuant to the National Railway Labor Act, within the jurisdiction of the federal courts?

III. Should the trial court's finding that the evidence was insufficient to prove a discriminatory application of the contract by respondents be disturbed?

REASONS FOR DENYING THE WRIT

I. The contract is not illegal in terms and effect. If the jurisdiction of the court is dependent upon illegality in

the contract which is violative of petitioners' rights under the Railway Labor Act, then the Court of Appeals was correct in its statement that, "Jurisdiction of the court is determined by resort to the contract which must speak for itself." The challenged provision pertains to wages, hours and working conditions, proper subjects of a bargaining agreement under the Railway Labor Act, and respondent's position is best stated by the Court of Appeals, to wit: "There is nothing illegal per se in the provision forbidding reinstatement after six months from the date of dismissal for cause, without the consent of the bargaining agent and the carrier." The additional comment by the Court of Appeals to the effect that, "The provision is intended to do no more than regulate the composition of the roster of employes," is not, as suggested by petitioners herein, an admission by the Court of the illegality of the contract, if the Court's statement is considered in the light of the explanation in the record as to the reasons for the rule requiring consent of the bargaining agent, after the expiration of six months, to the reinstatement of an employe who has been dismissed for cause. The disputed provision has been in all agreements between respondent carrier and the bargaining agent since the year 1925 (R. 222), evidencing the fact that the dispute in the present instance was handled in the "usual manner"—the method of handling in operation for over twenty-five years between the carrier and its employes. This accords with Section 153, First (i), of the Railway Labor Act providing, "Disputes between an employe or group of employes and a carrier or carriers, growing out of grievances * * * concerning rates of pay * * * shall be handled in the usual manner up to and including the chief operating officer * * *."

The disputed contract provision is applicable to and binding upon members of the Trainmen's Union, the bar-

gaining agent, as well as members of a minority union such as the individual petitions herein. It is the method chosen by the majority of the employes to protect all of the employes in their seniority rights. As explained by testimony in the record, its purpose is to prevent a company official from reinstating an employe without the employes themselves having a voice therein after expiration of six months, or a year, or two years, to the injury of all employes with seniority positions below the man reinstated (R. 222). Someone has to speak on behalf of all of the employes in this situation. What is more logical, democratic and fair to all the employes than to permit the bargaining agent representing the majority of the employes to speak for all whose rights are involved. And in this situation, what is good for the employes is also good for management. Here is a clear-cut provision relative to a proper bargaining matter, to-wit, reinstatement. It is management that reinstates and not the bargaining agent, and without such a provision the bargaining agent has no check upon the management in connection with reinstatement. Without such a provision each case of reinstatement would be a potential source of conflict and many cases of reinstatement would be carried to the Railroad Adjustment Board that are now settled at the conference table in consonance with the basic design of the Railway Labor Act. It is this right, placed in the logical representative, the bargaining agent, to police reinstatement by management that is under attack and which, it is claimed, is a deliberate hostile bargaining attempt on the part of the bargaining agent to discriminate against employe members of minority unions. The contract itself does not by its terms provide for any such illegal practice, nor does it, as was pointed out by the Court of Appeals, contain "invidious proscriptive factors

that are inimical to statutory or constitutional rights such as racial discrimination", and such as were struck down in

Steele v. *Louisville & Nashville R. Co.*, 323 U. S. 192, 65 S. Ct. 226, 89 L. Ed. 173;

T. & N. O. R. Co. v. *Brotherhood of Railway Steamship Clerks*, 281 U. S. 548, 50 S. Ct. 427, 74 L. Ed. 1034;

Virginian Ry. Co. v. *System Federation*, 300 U. S. 515, 57 S. Ct. 592, 81 L. Ed. 789;

Tunstall v. *B. L. F. & E.*, 323 U. S. 210, 65 S. Ct. 235, 89 L. Ed. 187;

Graham v. *Brotherhood of Firemen*, 338 U. S. 232, 70 S. Ct. 14, 94 L. Ed. 22.

The Tenth Circuit Court of Appeals here follows the rationale of *Hayes* v. *Union Pacific Railroad Co.*, 184 F. 2d 337, cert. den. 340 U. S. 942, 71 S. Ct. 506, 95 L. Ed. 680, from the Ninth Circuit; *Spires* v. *Southern Railway Co.*, 204 F. 2d 453, from the Fourth Circuit; and *Colbert* v. *Brotherhood of Railroad Trainmen*, 206 F. 2d 9, from the Ninth Circuit.

From the complaint it is obvious, and throughout the proceedings it was admitted, that the carrier dealt with the chosen representatives of the individual petitioners. Since no agreement was reached, the petitioners had an adequate remedy by referring the dispute to the National Railroad Adjustment Board under 45 U. S. C. A., Section 153, First (i). The intervention of the federal court was neither necessary for relief by way of declaratory judgment or injunction, nor permissible under the Railway Labor Act and the decisions holding that exclusive jurisdiction over such a dispute lies with the Railroad Adjustment Board.

Slocum v. *Delaware, L. & W. R. Co.*, 339 U. S. 239, 70 S. Ct. 577, 94 L. Ed. 795;

Order of Railroad Conductors of America v. *Southern Railway Co.*, 339 U. S. 255, 70 S. Ct. 585, 94 L. Ed. 811;

Colbert v. *Brotherhood of Railroad Trainmen*, supra;

Spires v. *Southern Railway Co.*, supra;

Brotherhood v. *Central of Georgia Ry. Co.*, 199 F. 2d 384, cert. den. 73 S. Ct. 648;

Butler v. *Thompson*, 192 F. 2d 831;

Broady v. *Illinois Central R. Co.*, 191 F. 2d 73, (cert. den. 342 U. S. 897, 72 S. Ct. 231, 96 L. Ed. 672);

Starke v. *New York, Chicago & St. L. R. Co.*, 180 F. 2d 569;

Brooks v. *Chicago, R. I. & P. R. Co.*, 177 F. 2d 385.

II. Exclusive jurisdiction to grant relief in disputes involving the interpretation and application of a contract not illegal in terms or effect lies with the National Railroad Adjustment Board. The actual commission of a discriminatory act under a contract legal in terms and effect does not taint the contract with illegality so as to invest the federal courts with jurisdiction. Any contract is subject to breach and defaults in performance, and discriminatory acts may be committed either by management or the bargaining agent in connection with any collective bargaining agreement entered into under the Railway Labor Act. But such breaches in connection with a contract entered into pursuant to the Railway Labor Act, the contract being valid

in terms and effect, are to be corrected by the Railroad Adjustment Board and are corrected by the Railroad Adjustment Board in their "interpretation" that the breach or discrimination contravenes the legitimate objects of the agreement, and the jurisdiction to determine such questions is exclusive with the Railroad Adjustment Board. For such breaches they can and do afford relief. (*Slocum* v. *Delaware, L. & W. R. Co., supra*). There is nothing in this case except the interpretation and application of an agreement concerning rates of pay, rules, and working conditions.

Radio Officers Union of the Commercial Telegraphers Union (AFL) v. *National Labor Relations Board,* 347 U. S. 17, cited by petitioners herein, is concerned with factual situations which were held to be discriminatory. The *Radio Officers* case and the other cases consolidated in that opinion are instructive on the question of what acts constitute illegal discrimination and as such will doubtless furnish important guideposts to the Railroad Adjustment Board, as well as the National Labor Relations Board, but the question of jurisdiction was not involved. In the instant case, respondent's contention is that the National Railroad Adjustment Board is vested with exclusive jurisdiction to "interpret" the contract, to decide with respect to its "application", and in so doing determine whether or not the contract has been discriminatorily applied, as the National Labor Relations Board did in the first instance in the cases referred to.

III. If we are correct in either of the two foregoing questions discussed, the third question, namely, whether or not the trial court's finding that the contract had not been discriminatorily applied, is actually moot. But assuming the District Court had jurisdiction to entertain the action and jurisdiction to determine the question of whether the contract had been discriminatorily applied or not and grant relief by way of injunction or declaratory judgment, nothing

in the record warrants the court in granting a writ of certiorari to review the trial court's finding that the evidence failed to show that respondents had engaged in an illegal and discriminatory application of the contract in violation of petitioners' rights.

CONCLUSION

The questions presented are not new to this court, but have been settled in the *Slocum* case and other cases cited herein. There seems to be no conflict in the opinions of the Circuit Courts on the questions here presented. The Tenth Circuit Court in this instance has not decided the questions herein presented in conflict with decisions of other Circuit Courts, but on the contrary, the decision is in accord with the holding of the Ninth Circuit in the *Hayes* and *Colbert* cases, supra, and the Fourth Circuit in the *Spires* case, supra.

For these reasons the petition for writ of certiorari should be denied.

Respectfully submitted,

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and Depot Company.

May 10, 1954

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STATUTE CITED

45 U.S.C.A., Section 153, First (i) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 705

SWITCHMEN'S UNION OF NORTH AMERICA, an unincorporated labor union; R. H. MORITZ; L. B. HILL, JR.; and V. H. WORKMAN, *Petitioners*,

v.

THE OGDEN UNION RAILWAY AND DEPOT COMPANY, a corporation; and BROTHERHOOD OF RAILROAD TRAINMEN, an unincorporated labor union, *Respondents*.

BRIEF OF RESPONDENT BROTHERHOOD OF RAILROAD TRAINMEN IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

(Numerals in parenthesis refer to pages of the printed record and italics are ours.)

OPINIONS BELOW

The opinion of the District Court (oral statement R. 275-279) is unreported. The opinion of the United States Court of Appeals, Tenth Circuit, is found at R. 286-290, and is reported in 209 F. 2d 419.

QUESTIONS PRESENTED

The petitioners seek to present questions not involved in this case. The United States District Court of Utah based its opinion primarily upon the proposition that the judiciary had no jurisdiction of this cause until the remedies of petitioners had been exhausted before the National Railroad Adjustment Board, the tribunal created by Congress in the Railway Labor Act to handle and process disputes such as here involved.

The United States Court of Appeals, Tenth Circuit, did not reach the merits of the case but held unequivocally that the judiciary had no jurisdiction because the remedies provided by Congress before the National Railroad Adjustment Board had not been exhausted by petitioners. Hence, the questions and specifications of errors presented by petitioners are not properly here. The one question involved in this case is whether or not the judiciary has jurisdiction to hear disputes between employees and a carrier growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions where the complaining party has not exhausted his remedy before the said Adjustment Board.

This Court will not consider questions not reached by the Circuit Court. *Owens v. Union Pacific R. Co.*, 319 U.S. 715, 63 S. Ct. 1271, 87 L. Ed. 1683.

STATUTES INVOLVED

The Statute with which this Court is directly concerned here is 45 *U.S.C.A.*, Section 153, First (i), being in Section 3 of the Railway Labor Act, which provides:

> "The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application

of agreements concerning rates of pay, rules or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

STATEMENT

The statement of the case contained in the petition is accurate except as to petitioners' construction of the decisions of the lower courts. The petition is inaccurate when it states that the trial court did not dismiss the case for want of jurisdiction.

In making its ruling the trial court orally stated:

> "It is the judgment of the Court that the administrative remedy has not been exhausted in this matter. It is further the judgment of the Court that he has no jurisdiction in this matter, that under the Act of Congress it should have been submitted to the Railway Adjustment Board for determination." (278)

The trial court's Conclusion of Law No. III stated:

> "That the plaintiffs have not exhausted the administative remedy which they have under the Railway Labor Act to present their claims before the National Railroad Adjustment Board." (179)

These two quotations clearly establish that the primary basis of the trial court's decision was lack of jurisdiction to hear the cause before the administrative remedy had been exhausted.

The Circuit Court based its opinion upon this same proposition. That court concluded its opinion with these words:

> "* * * And since provision is made under 45 U.S. C.A. Sec. 153, First (i) for referral of a dispute by either party to the Railway Adjustment Board upon a failure to reach an agreement at the company level, exclusive jurisdiction lies in that tribunal, and not in the Federal courts." (290)

The Rule and Note in question have been in all agreements concerning rates of pay, rules, and working conditions between defendant carrier and its employees since 1925. Said Rule and Note prescribe the usual manner of handling grievances and disputes on a company level (175, 222).

The Switchmen's Union processed the claims for reinstatement and back pay of the individual plaintiffs with company officials in the usual manner as provided in 45 U.S.C.A., Sec. 153 First (i), above quoted. When that process had been completed and the grievances were disallowed by company officials the Switchmen's Union decided to no longer follow the statute by presenting the matter to the National Railroad Adjustment Board, but decided to resort to the courts to strike down this Rule and Note.

Petitioners omitted from their statement of the case the significant fact found by the trial court that the questioned Rule and Note are necessary to protect and to maintain the seniority rights of employees of the defendant carrier (176, 224-227). Without this provision the carrier could reinstate employees after they had been discharged at any time in the past, thereby upsetting the entire seniority

roster. The employees should have something to say about this matter, and the logical representative would be the bargaining agent, duly elected by the majority of employees, in this case, the Brotherhood.

PETITIONERS' REASONS NOT SUFFICIENT FOR ALLOWANCE OF WRIT

Petitioners have not squarely met the holding of the lower courts and have not recognized the strong and uniform authorities construing the Railway Labor Act in accordance with that holding. They cite cases construing the National Labor Relations Act, in which the administrative remedies had been exhausted before presentation to the courts.

This Court has consistently denied certiorari where lower courts have held under the Railway Labor Act that plaintiffs must first seek redress from the National Railroad Adjustment Board and that courts do not have jurisdiction until that remedy is exhausted. See *Colbert v. Brotherhood of Railroad Trainmen,* 206 F. 2d 9 (9 C.C.A.) (cert. den. 74 S. Ct. 320, 22 L.W. 3186, rehearing den. 74 S. Ct. 514, 22 L.W. 3228); *Broady v. Illinois Central R. Co.,* 191 F. 2d 73 (7 C.C.A.) (cert. den. 342 U.S. 897, 72 S. Ct. 231, 96 L. Ed. 672); *Brotherhood of Locomotive Firemen & Enginemen v. Central of Georgia Ry. Co.,* 199 F. 2d 384 (5 CC.A.) (cert. den. 345 U.S. 908, 73 S. Ct. 648); *United R.R. Operating Crafts v. Northern Pac. Ry. Co.,* 208 F. 2d 135 (9 C.C.A.) (cert. den. 74 S. Ct. 529, 22 L.W. 3236); *United Railroad Operating Crafts v. Wyer,* 205 F. 2d 153 (7 C.C.A.) (cert. den. 74 S. Ct. 531, 22 L.W. 3236).

This Court has held that neither the Federal Courts, *Order of Railroad Conductors v. Pitney,* 326 U.S. 561, 66 S. Ct. 322, 90 L. Ed. 318, nor the State Courts, *Slocum v.*

Delaware, L. & W. R. Co., 339 U.S. 239, 70 S. Ct. 577, 94 L. Ed. 795, have jurisdiction to originally hear controversies which are properly submissible to the National Railroad Adjustment Board.

The courts have generally held that the foregoing cases decided by this Court have effectively denied to the judiciary jurisdiction to handle disputes between employees and carriers involving reinstatement, restoration of full rights of seniority and back pay. *Brooks v. Chicago, R.I. & P.R. Co.*, 177 F. 2d 385 (8 C.C.A.); *Starke v. New York, Chicago and St. Louis R. Co.*, 180 F. 2d 569 (7 C.C. A.); *Broady v. Illinois Cent. R. Co.*, 191 F. 2d 73; *Butler v. Thompson*, 192 F. 2d 831 (7 C.C.A.); *Brotherhood of Locomotive Firemen & Enginemen v. Central of Georgia Ry. Co.*, 199 F. 2d 384 (5 C.C.A.); *Spires v. Southern Railway Co.*, 204 F. 2d 453 (4 C.C.A.); *Colbert v. Brotherhood of Railroad Trainmen*, 206 F. 2d 9 (9 C.C.A.).

The policy behind the congressional enactment referring these disputes to an administrative tribunal is stated by this Court in the *Slocum* case, supra (U.S. p. 243):

> "• • • The Act thus represents a considered effort on the part of Congress to provide effective and desirable administrative remedies for adjustment of railroad-employee disputes growing out of the interpretation of existing agreements. The Adjustment Board is well equipped to exercise its congressionally imposed functions. Its members understand railroad problems and speak the railroad jargon. Long and varied experiences have added to the Board's initial qualifications. Precedents established by it, while not necessarily binding, provide opportunities for a desirable degree of uniformity in the interpretation of agreements throughout the nation's railway systems."

Maintenance and protection of seniority rights is a proper subject to incorporate in an agreement relating to rates of pay, rules, or working conditions. Someone has to supervise its maintenance in behalf of the employees, and the logical choice should be the bargaining agent elected to that position by a majority of the employees and a party to the agreement to be construed.

This Court in *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 65 S. Ct. 226, 89 L. Ed. 173, recognized that uniformly favorable effects on everyone is not a necessity to the validity of a bargaining agreement or a provision therein. This Court there stated (U.S. p. 203):

> "This does not mean that the statutory representative of a craft is barred from making contracts which may have unfavorable effects on some of the members of the craft represented. Variations in the terms of the contract based on differences relevant to the authorized purposes of the contract in conditions to which they are to be applied, such as differences in seniority, the type of work performed, the competence and skill with which it is performed, are within the scope of the bargaining representation of a craft, all of whose members are not identical in their interest or merit."

Similar language was used in *Ford Motor Co. v. Huffman*, 345 U.S. 330, 73 S. Ct. 681.

A number of cases have involved discrimination between various groups of employees, and courts have uniformly held that redress from the National Railroad Adjustment Board must first be sought and the judiciary has no jurisdiction in the first instance except where constitutionally prohibited racial discrimination has resulted which this Court has declared to be "invidious." See *Steele* case, supra. For instance, a provision limiting representation and appeal to the bargaining agent on a company level

has been held valid. *Brooks* and *Butler* cases, supra. Likewise courts have held the validity of seniority right provisions in bargaining agreements which have varying effects on different employees should be submitted to the National Railroad Adjustment Board. See *Spires, Colbert,* and *Starke* cases, supra.

The Court of Appeals for the Ninth Circuit in *Hayes v. Union Pacific R. Co.,* 184 F. 2d 337 (Dist. Ct. Op. 88 Fed. Supp. 108), held the judiciary is not charged by federal law with the duty or function of policing the parties in the performance of collective bargaining agreements. That function should be performed by the tribunal created by Congress for that purpose. As stated by the Court in *Brotherhood of Locomotive Firemen & Enginemen v. Central of Georgia Ry. Co.,* supra, (p. 385):

> "Only after the Adjustment Board has acted can it definitely appear that relief by the courts is necessary to insure compliance with the statute. Order of Conductors v. Pitney, 326 U.S. 561, 66 S. Ct. 322, 90 L. Ed. 318."

We will now take up in its order each of the reasons advanced by petitioners for the allowance of the writ herein and demonstrate that they are not sufficient for the purpose claimed.

1. Reliance is placed upon *Radio Officers' Union, etc., v. National Labor Rel. Bd.,* 347 U.S. 17, 74 S. Ct. 323, for allowance of the writ herein. Concededly that case arises under the National Labor Relations Act not the Railway Labor Act. There are two very significant and controlling distinctions between that case and the one at bar. In the first place no jurisdictional ground was involved or urged in the *Radio Officers'* case. Such contention is the main contention here and the one upon which the lower courts

based their decisions. Secondly, the parties in the Radio Officers' case had complied with the Federal Statutes and exhausted their administrative remedies before the National Labor Relations Board. That board had decided the case and made an order which it sought to have enforced by the judiciary. Here there has been no presentation to the administrative board created by the Railway Labor Act.

2. Petitioners rely upon *National Labor Rel. Bd. v. Lummus Co.*, 210 F. 2d 377 (5 C.C.A.), and *National Labor Rel. Bd. v. Gottfried Baking Co.*, 210 F. 2d 772 (2 C.C.A.). Here again petitioners fail to see the significant distinction between those cases and the case at bar. In the case at bar no effort has been made to pursue the remedy afforded by the National Railroad Adjustment Board. In the two cases cited the administrative remedy of the parties had been exhausted and appeal for assistance from the judiciary was made only after the administrative remedy had been completed.

3. Under this point petitioners plead that the carrier may interfere with, influence or coerce its employees in the choice of representatives by means of a collective bargaining agreement and that employees of railroads do not have the same protection from employers' interference, influence and coercion afforded employees of other industires coming under the National Labor Relations Act.

The difficulty with the petitioners' position here is that they have not sought the proper remedy to procure protection of their rights alleged to have here been violated. The sole problem involved before this Court is a jurisdictional one. Petitioners here again avoid meeting the only proposition and the only question which could be before this Court.

CONCLUSION

The respondent, Brotherhood of Railroad Trainmen, respectfully submits that the decisions of the lower courts in requiring first a resort to the administrative tribunal for relief and holding no judicial jurisdiction present, correctly state the law and this Court should not, as it has not in a number of cases of recent date, grant a petition and burden itself and other courts with the function of policing bargaining agreements made pursuant to the Railway Labor Act.

We respectfully request that the petition be denied.

Respectfully submitted,

CALVIN W. RAWLINGS,
BRIGHAM E. ROBERTS,
Counsel for Respondent.

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FILED
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HAROLD B. WILLEY,

NO. 705

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

SWITCHMEN'S UNION OF NORTH AMERICA, An Unincorporated Labor Union; R. H. MORITZ; L. B. HILL; and V. H. WORKMAN, *Petitioners,*

v.

THE OGDEN UNION RAILWAY AND DEPOT COMPANY, A Corporation; and BROTHERHOOD OF RAILROAD TRAINMEN, An Unincorporated Labor Union.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Tenth Circuit

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Attorneys for Petitioners.

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1. Despite the statements in the briefs of the Brotherhood of Railroad Trainmen (pp. 3-4, 7-8, 10) and of the carrier (p. 4) to the effect that the case was dismissed for lack of jurisdiction, the judgment entered by the District

Court (R. 179-180) and affirmed by the Court of Appeals (R. 291) constituted an adjudication of the case on the merits. This judgment expressly adjudged that the contract, here under attack, was lawful in terms and effect and that it had not been applied in violation of any rights of the Plaintiffs under the Railway Labor Act (R. 179-180). The Court of Appeals in its opinion stated that there was nothing illegal about this contract (R. 289). Hence both courts below did pass upon the merits of the issues tendered to this Court by the petition for a Writ of Certiorari.

2. Nor are Respondents correct in their assumption that the National Railroad Adjustment Board is the administrative agency vested by the Railway Labor Act with the administration of that Act in a manner parallel to the administration of the National Labor Relations Act by the National Labor Relations Board (Trainmen's Union Br., p. 9; Railway Co. Br., p. 9). The National Railroad Adjustment Board was not created by Congress for the purpose of administering the provisions of the Railway Labor Act (45 U.S.C. 152) which parallel the unfair labor practice and representation provisions of the National Labor Relations Act (29 U.S.C. 158 and 159). Rather the National Railroad Adjustment Board was created primarily for the purpose of interpreting and applying collective bargaining agreements (45 U.S.C. 153, First (i)), a function for which the National Labor Relations Act made no express provision by the establishment of, or delegation to, an administrative agency or otherwise. See Lloyd K. Garrison, The National Railroad Adjustment Board: A Unique Administrative Agency, 46 Yale Law Journ. 567 (1937); *Elgin, Joliet & Eastern Ry.* v. *Burley*, 325 U. S. 711, 722, 726-727 (1945), affirmed on rehearing, 327 U. S. 661 (1946).

The Railway Labor Act did not make any provision for the administration by an administrative agency of its pro-

visions making carrier interference, influence or coercion in the choice of representatives illegal. Accordingly, it has uniformly been held that these provisions of the Railway Labor Act are to be enforced by the courts. *Texas & New Orleans Ry. Co.* v. *Brotherhood of Railway & Steamship Clerks*, 281 U. S. 548, 566-568 (1930); *Virginian Ry. Co.* v. *System Federation*, 300 U. S. 515, 545 (1937); *Myers* v. *Louisiana & A. Ry Co.*, 7 F. Supp. 92 (W. D. La., 1933); *Myers* v. *Louisiana & A. Ry. Co.*, 7 F. Supp. 97 (W. D. La., 1934); *Nashville, C. & St. L. Ry.* v. *Railway Employees Dep't.*, 93 F. 2d 340 (C.A. 6, 1937); *System Federation No. 91* v. *Reed*, 180 F. 2d 991 (C.A. 6, 1950); *Brotherhood of Railway and Steamship Clerks* v. *Atlantic Coast Line R.R. Co.*, 201 F. 2d 36 (C.A. 4, 1953), certiorari denied, 345 U.S. 992.

3. The briefs in opposition (Trainmen's Union Br., p. 4; Railway Co. Br., p. 6) defend the grant to the Trainmen's Union of unlimited discretion over reinstatements after six months of employees not represented by it or the Order of Railway Conductors, as a proper protection of seniority. We have always conceded that the Trainmen's Union had a legitimate interest in the establishment of proper objective standards respecting seniority. However, vesting in it any uncontrolled discretion over employment rights violates the Railway Labor Act. The following statement of the National Labor Relations Board is here applicable (*Pacific Intermountain Express Co.*, 107 NLRB No. 158, 33 LRRM 1252, 1253-1254):

> "The objective standards relevant to a determination of seniority generally derive from the employment history of the employees involved, and that information is, as a rule, peculiarly within the knowledge of the employer. Indeed, the area in which the union is likely to be more informed than the employer with respect to the employer's employees is that pertaining to employees' union membership or to the employees' compliance with the union's constitution, by laws, or other regulations—subjects however, which ob-

viously are not relevant considerations in the implementation of a seniority provision. We can therefore see no basis for presuming that when an employer delegates to a union the authority to determine the seniority of its employees, or even to settle controversies with respect to seniority, such control will be exercised by the union in a non-discriminatory manner. Rather, it is to be presumed, we believe, that such delegation is intended to, and in fact will, be used by the union to encourage membership in the union. Accordingly, the inclusion of a bare provision, like that in the 1949 contract, that delegates complete control over seniority to a union is violative of the Act because it tends to encourage membership in the Union. And because we believe that it will similarly tend to encourage membership in the union, we also conclude that, the inclusion of a statement, like that in the 1952 contract, that seniority will be determined without regard to union membership is not itself enough to cure the vice of giving to the Union complete control over the settlement of a 'controversy' with respect to seniority."

Indeed, the courts below were not asked by the Petitioners to indulge in the presumption on which the National Labor Relations Board premised its above quoted decision. For in the instant case there is undisputed evidence that two responsible officials of the Trainmen's Union assured Moritz that he would be reinstated to employment with the carrier immediately if applied for membership in, and was accepted by, the Trainmen's Union (R. 191-193).

Respectfully submitted,

SOLOMON SACHS,
S. WALTER SHINE,
Attorneys for Petitioners.

May 26, 1954.